STATE OF MICHIGAN

COURT OF APPEALS

FANG DAI,

Plaintiff/Counterdefendant-Appellee/Cross-Appellant,

v

GOLDEN WAY INN CORPORATION, d/b/a GOLDEN WAY SECURITY CORPORATION,

Defendant/Counterplaintiff-Appellant/Cross-Appellee,

and

LEN WEI,

Defendant.

UNPUBLISHED
August 12, 2003

No. 236994
Wayne Circuit Court
LC No. 00-024557-CK

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

This is an action to recover unpaid commissions on mortgage loans. Defendant appeals as of right a judgment for plaintiff in the amount of $49,722.72, entered following a bench trial, and the trial court's verdict of no cause of action on defendant's counterclaim. Plaintiff cross appeals the trial court's dismissal of counts II through V of her complaint and its denial of her motion for mediation sanctions. We affirm.

I. Basic Facts

Defendant was in the business of brokering mortgage loans. Lenders paid defendant a commission for each mortgage loan it sold. Defendant hired plaintiff as a loan officer in March 1995. It was stipulated that defendant and plaintiff orally agreed that defendant would pay plaintiff fifty percent of the net commissions on the loans she handled according to the industry standard.

Defendant had individual contracts with each lender including DMR Mortgage Company. In November 1997, defendant began to experience financial difficulties, so it instituted a

promotional program allowing customers to pay one percent of the loan to lock in an option to refinance at a guaranteed interest rate with no further costs or points. As a result, defendant tripled its business each month. However, defendant only made a profit on the first closing, taking a loss on the refinances.

At some point, plaintiff began to complain to defendant that she was not being paid her full commissions. Defendant was also sued by DMR which alleged that defendant breached its agreement to not solicit DMR customers to refinance mortgage loans for 180 days after the original closing. When plaintiff pressed defendant about the commissions due, defendant suspended her employment. Approximately two months later, plaintiff either quit or was fired. However, she was added as a party to the DMR lawsuit and ultimately signed a settlement agreement. Defendant paid the entire amount in the settlement agreement.

After a bench trial, the trial court found that defendant owed plaintiff $49,722.72 in unpaid commissions, but nothing on the refinances involving DMR customers. Plaintiff's remaining claims were dismissed. The trial court entered a judgment of no cause of action in defendant's counterclaim, finding there was no evidence that plaintiff was personally liable on the losses defendant sustained on the promotional program.

II. Defendant's Appeal

A. Breach of Contract

Defendant first argues that the trial court erred in awarding plaintiff damages for breach of contract because she had not pleaded breach of contract in her complaint. We disagree.

A trial court's findings of fact "may not be set aside unless clearly erroneous." MCR 2.613(C). A finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). Questions of law are reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

Defendant stipulated that it had an agreement to pay plaintiff fifty percent of the net profits on each loan. Defendant then moved to dismiss, correctly arguing that a contract may not be implied in equity where one is proven to exist as a matter of fact. *Neal v Neal*, 219 Mich App 490, 495; 557 NW2d 133 (1996). In denying the motion, the trial court found that, under Michigan's system of notice pleading, plaintiff's complaint sufficiently asserted a claim for breach of contract and that a quantum meruit claim was pleaded in the alternative.

After carefully reviewing the complaint, we agree with the trial court that plaintiff alleged breach of an agreement with sufficient detail to "reasonably . . . inform the adverse party of the nature of the claims the adverse party is called on to defend . . . ." MCR 2.111(B)(1); see also *Nationsbanc Mortg Corp v Luptak*, 243 Mich App 560, 566; 625 NW2d 385 (2000). The trial court properly denied defendant's motion to dismiss.

B. Modification of the Agreement

Next, defendant argues that the trial court erred in essentially finding that it could not modify the terms of the agreement concerning plaintiff's compensation. We disagree.

In *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 598; 292 NW2d 880 (1980), our Supreme Court "held that a company's written policy statements providing for dismissal for just cause may create contractual obligations if the statements give rise in the employee to legitimate expectations of dismissal for just cause." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 529; 473 NW2d 652 (1991). In *Dumas*, the Court chose not to extend the "'legitimate expectations' cause of action" beyond the wrongful discharge arena. See *id.* 528-529. Instead, compensation cases should be analyzed under traditional contract principles. See *id.* at 530-531. As quoted by defendant, the Court also mentioned policy considerations favoring flexibility in corporate decision-making. See *id.* at 531-532.

Because defendant stipulated that it had a contract with plaintiff, there was no need to imply a contract under a legitimate expectations theory. Further, plaintiff did not assert a legitimate expectations cause of action in her complaint. Rather, she claimed that defendant paid her less than the agreement provided. The trial court did not err in finding that defendant breached the agreement with plaintiff.

C. Dismissal of Defendant's Counterclaim

Defendant next argues that the trial court erred in dismissing its counterclaim for contribution because, by failing to pay her share of the DMR settlement, plaintiff was unjustly enriched. Defendant also argues that plaintiff misrepresented her repayment obligations and that there is a statutory right of contribution.[1] We again disagree. Questions of statutory construction are reviewed de novo. *Donajkowski v Alpena Power Co*, 460 Mich 243, 248; 596 NW2d 574 (1999).

To establish a statutory right of contribution, defendant had to show: (1) joint and several tort liability with plaintiff, (2) that defendant paid more than its pro-rata share of the judgment, (3) that the settlement agreement extinguished plaintiff's liability, (4) that reasonable efforts were made to notify plaintiff of pending settlement negotiations, (5) that plaintiff was given a reasonable opportunity to participate in settlement negotiations, and (6) that the settlement agreement was entered into in good faith. *Klawiter v Reurink*, 196 Mich App 263, 267; 492 NW2d 801 (1992); see also MCL 600.2925a. DMR sued defendant in contract, but it is not clear whether it also sued defendant in tort. Additionally, the settlement agreement between the parties and DMR makes no admissions of liability and does not address the issue of contribution. Therefore, defendant failed to show that there was joint and several tort liability with plaintiff. Further, there was no evidence that plaintiff was notified of pending settlement negotiations or

[1] Defendant also alleges that plaintiff was liable for the losses sustained in the refinances. However, because no such allegations were made in the counterclaim, that issue has been waived. See MCR 2.203(A).

given a reasonable opportunity to participate. Therefore, the trial court correctly found that defendant failed to show that it had a right of contribution from plaintiff under the statute.

D. Costs and Attorney Fees

Defendant also argues that, because the trial court dismissed plaintiff's claim under the Sales Representatives Act, MCL 600.2961, she was liable for costs and reasonable attorney fees. We disagree. The decision whether to award attorney fees is reviewed for clear error. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 697; 662 NW2d 804 (2003).

Pursuant to MCL 600.2961(6), "[i]f a sales representative brings a cause of action pursuant to this section, the court shall award to the prevailing party reasonable attorney fees and court costs." However, it is clear that plaintiff was not a "sales representative" under the statute because she was not employed "for the solicitation of order or sale of goods." MCL 600.2961(1)(e). Similarly, defendant was not a "principal" because it did not manufacture or produce a "product," nor did it contract with plaintiff to solicit orders or sell a product. MCL 600.2961(1)(d). Additionally, defendant was not a prevailing party within the meaning of the statute because it did not "win[] on all the allegations of the complaint or on all of the responses to the complaint." MCL 600.2961(1)(c). Therefore, the trial court did not err in refusing to award defendant attorney fees and costs.

E. Admission of Exhibits

Defendant also argues that the trial court erred in admitting plaintiff's exhibits 8 through 84, 86, and 87, and in excluding defendant's exhibit 2.[2] We disagree.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Preliminary issues of admissibility are reviewed de novo. See *id.* However, "[a]n error in the admission or the exclusion of evidence . . . is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A); see also MRE 103(a).

Plaintiff's exhibits 8 through 84 were defendant's business records, compiled and kept in the ordinary course of defendant's business. See MRE 803(6). The testimony also showed that plaintiff's exhibits 86 and 87 were summaries of exhibits 8 through 84, prepared by plaintiff herself. See MRE 1006. Thus, the trial court did not abuse its discretion in admitting plaintiff's exhibits.

[2] While defendant does not specify which exhibit it argues should have been admitted by the trial court, exhibit 2 was discussed in the transcript pages cited.

By contrast, defendant's exhibit 2 was prepared by someone who was not in court to testify concerning what documents she used to prepare it. Additionally, the documents summarized in the exhibit had not been made available to plaintiff's counsel for examination as required by MRE 1006. Therefore, the trial court did not abuse its discretion in excluding it.

III. Plaintiff's Cross Appeal

A. Default

On cross appeal, plaintiff argues that the trial court erred in allowing this case to go to trial on the issue of liability when an entry of default had been made against defendant. We disagree. A decision on a motion to set aside an entry of default is reviewed for abuse of discretion. *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 552 n 8; 620 NW2d 646 (2001).

Along with her answer to defendant's counterclaim, plaintiff filed a demand for a response "under penalty of Default," pursuant to MCR 2.110(B)(5). Defendant failed to respond. However, instead of filing a notice of entry of default, as required by MCR 2.603(A)(2)(b), plaintiff's counsel filed an affidavit and what purports to be an entry of default by plaintiff's counsel. The docket sheet does not contain an entry of default by the court clerk. See MCR 2.603(A)(1).

Although MCR 2.603(A)(3) states that a defaulted party "may not proceed with the action until the default has been set aside," the parties participated in mediation, settlement conferences and appeared before the trial court on occasion. Although defendant did not file a formal motion to set aside the entry of default, and the affidavit it filed addresses only the issue of good cause, not whether a meritorious defense existed to plaintiff's claims, MCR 2.603(D)(1), in light of all the circumstances, we find that the trial court did not abuse its discretion in ordering the parties to proceed as though no default had been entered.[3]

B. Commissions in DMR Refinances

Plaintiff next argues that the trial court erred in refusing to award her unpaid commissions in the DMR refinances. We again disagree.

The trial court found that plaintiff failed to prove that defendant was paid a second commission when the DMR loans were refinanced. A trial court's findings of fact "may not be set aside unless clearly erroneous." MCR 2.613(C). After carefully reviewing the record, we find the trial court did not err in entering a verdict of no cause of action on that claim.

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[3] Additionally, only the allegations of plaintiff's answer to the counterclaim were deemed admitted by defendant's failure to respond. See MCR 2.110(B)(5); see also MCR 2.111(E)(1). Because the counterclaim was eventually dismissed, plaintiff was not prejudiced by the court's alleged error in setting aside the default.

C. Case Evaluation Sanctions

Next, plaintiff argues that the trial court erred in refusing to assess case evaluation sanctions against defendant. We disagree. A party's entitlement to case evaluation sanctions is a question of law to be reviewed de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001).

MCR 2.403(O)(1) provides that, "[i]f a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation." "For the purpose of subrule (O)(1), . . . the verdict is considered more favorable to a defendant if it is more than 10 percent below the evaluation . . . ." MCR 2.403(O)(3). In this case, the $49,722 verdict for plaintiff was more than ten percent below the $60,000 evaluation. Therefore, the trial court properly refused to award sanctions.

D. Plaintiff's Jury Demand

Finally, plaintiff argues that she was deprived of a fair trial because, despite having made a jury demand and paid the appropriate fee, this case was tried by the court. We disagree.

"[T]he subsequent waiver of a properly demanded jury trial can be inferred from the conduct of the parties under a 'totality of circumstances' test." *Marshall Lasser, PC v George*, 252 Mich App 104, 108; 651 NW2d 158 (2002). In this case, although the record indicates that plaintiff filed a jury demand and paid the attendant fee, she never objected to having a bench trial. Accordingly, an agreement to waive the right to a jury trial can be implied from the parties' conduct. *Id.* at 109. Further, a party cannot be allowed to harbor error as an appellate parachute. *Id.* at 109; see also *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Given the circumstances, "it would simply be unfair" to reverse on this basis. *Marshall*, *supra* at 109.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly